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C Purshouse, R Heywood, J Miola, E Cave, S Devaney ‘Should doctors fighting covid-19 be immune from negligence liability? No!’ (2020) 370 BMJ m2487

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Should doctors fighting covid-19 be immune from negligence liability?

No!

Nobody could deny that doctors fighting the covid-19 pandemic are working in extraordinarily challenging conditions. Healthcare professionals have been granted an indemnity for errors deriving from covid-19 care, which means that they will not personally pay any clinical negligence damages. Such measures deserve our full support. Nonetheless, there have been suggestions that doctors should be immune from all clinical negligence liability for covid-19 related claims, [1] as is now the case in some US states. We believe that providing such an immunity is not only unnecessary but would also send a worrying symbolic message that patients are not entitled to proper care.

Immunity is unnecessary

In most cases immunity will be superfluous. To bring a negligence claim, a patient must demonstrate that the doctor failed to meet the required legal standard of care and that this failure caused the patient's injury. In cases of diagnosis and treatment, doctors must meet the standard of the reasonable doctor. [2] This means that doctors will only be found negligent if they did not comply with a responsible body of peer opinion or their actions had no logical basis. [3]. Not all errors are negligent though and context is crucial in establishing reasonableness. In a previous case, account was taken of the fact that doctors in pressurised A&E departments must make quick judgements without the luxury of consulting others. The judge confirmed that “the standard of care owed by an A&E doctor must be calibrated in a manner reflecting reality.” [4]

With this in mind, it will be exceptionally difficult to establish that doctors have acted negligently during the pandemic. It is only when blatant and egregious errors have occurred that doctors should be concerned, and in such cases, any immunity

would be wholly inappropriate. Most doctors therefore have nothing to fear from the law of negligence.

Unfair to patients

The difficult task facing doctors is apparent for all to see, but theirs are not the only relevant interests. We must also weigh in the balance the needs of patients. They are entitled to receive proper care, and immunity would send the wrong message about the acceptability of substandard practices.

If a patient is killed or injured due to egregious errors then it is not clear why the doctor should not be held to account. Nor is it obvious that the patient should not get an explanation or go uncompensated. Meagre state benefits do not adequately provide for the needs of the seriously injured. Negligence claims may lead to improved standards and help equip us to fight future pandemics.

We acknowledge that the clinical negligence system is far from perfect. [5] Nonetheless, any reform should not be a knee-jerk response that privileges one class of defendant, especially as doctors will not be paying any compensation themselves. [6] To argue otherwise could be taken to mean that patients should be thankful for any care in a pandemic, regardless of that fact that it may have been patently careless.

Bad for doctors

Finally, those pushing for clinical negligence immunity for doctors should be careful what they wish for, because doctors will often be patients too. The law of negligence enables employees to sue employers if they have not provided a safe system and place of work or provided appropriate tools and equipment. [7] Many health care workers are becoming ill or dying from covid-19 due to a lack of protective equipment. Hospital managers could easily say that they too are making difficult decisions in challenging circumstances. Should they also be immune from negligence liability? We doubt that the MDU or doctors would endorse such a proposition.

1. MDU. MDU calls for national debate over protecting NHS from COVID-19 clinical negligence claims <https://www.themdu.com/press-centre/press-releases/mdu-calls-for-national-debate-over-protecting-nhs-from-covid-19-clinical-negligence-claims>

[Accessed 27 April 2020].

2. *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

3. *Bolitho v City and Hackney HA* [1998] AC 2.
4. *Mulholland v Medway NHS Foundation Trust* [2015] EWHC 268 at [101] per Greene J.
5. Sumption J. Abolishing personal injuries law – a project. *Prof Neg.* 2018;34:113.
6. Coronavirus Act 2020, s 11 and https://resolution.nhs.uk/wp-content/uploads/2020/03/20200402-Tripartite_Indemnity_letter.pdf [Accessed 27 April 2020].
7. *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57.